UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION,

MDL NO. 1407

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This document relates to:

Peace v. Bayer Corp., C04-2001

This matter comes before the court on a motion for summary judgment filed by defendant Bayer Corporation. Having reviewed the parties' briefs and attachments thereto, the court finds and rules as follows.

I. BACKGROUND

Plaintiff Richard Peace filed this case on July 28, 2004, and was subsequently transferred to this multidistrict proceeding. He alleges that he suffered injury following ingestion of a phenylpropanolamine-containing medication, Alka Seltzer Plus, manufactured by defendant. Approximately one year later, on August 12, 2005, plaintiff Peace and his wife filed for Chapter 7 bankruptcy. They were discharged from bankruptcy on December 8, 2005.

Peace did not list this case as an asset in his bankruptcy

petition, did not list the claims as exempt property, and affirmed to the bankruptcy court under penalty of perjury that he was not a party to any lawsuit. He also did not notify his attorney in this matter that he had filed for bankruptcy, and defendant was therefore also unaware of the proceedings. Peace's bankruptcy came to light in or around January 2006, on defendants' counsel's investigation following a passing mention of bankruptcy by one of Peace's doctors.

On March 23, 2006, the Peaces moved the bankruptcy court to reopen the proceedings, asserting that "through inadvertence and poor advice from their prior bankruptcy counsel, an asset was omitted from Schedule B of their joint bankruptcy petition. The debtors move to re-open the case so that the Trustee may administer this asset." Emergency Motion to Re-Open Bankruptcy Case, Exh. 22 to Hanson Decl. Soon thereafter the bankruptcy court granted that motion.

Defendant filed this motion on April 12, 2006, arguing that with the filing of bankruptcy, Peace lost standing to pursue his claims, which must therefore be summarily dismissed.

II. DISCUSSION

A. Whether a Stay Applies to This Case

A threshold question is whether the re-opening of the Peaces' bankruptcy proceedings triggers a stay that would extend to the instant case. Plaintiff's bankruptcy counsel has filed a "Plea in Abatement" in this case, asserting, without authority, that it "acts as an automatic stay on all actions in all courts

and jurisdictions involving the debtor and his property." Exh. 22 to Hanson Decl.

Defendant argues that 11 U.S.C. §362(a) effects a stay on legal and administrative proceedings upon *initial filing* of bankruptcy, but that the bankruptcy statute does not authorize a stay upon a *re-opening* of the bankruptcy proceedings. Moreover, the statute provides for a stay of lawsuits against – not brought on behalf of – the debtor. Notwithstanding the assertion in plaintiff's Plea in Abatement, defendant concludes, no stay prevents the court from ruling in this case. Plaintiff's response to the motion is silent on the stay question.

The court finds that the re-opening of plaintiff's bankruptcy proceedings does not prevent ruling on the instant motion. 11 U.S.C. §362 clearly provides that the automatic stay ends when the bankruptcy case is closed, terminated or discharged. "Moreover, there is no statutory provision in which Congress has authorized a Bankruptcy Court once it has terminated the automatic stay pursuant to § 362(c)(2) to continue imposition of the automatic stay." *In re Trevino,* 78 B.R. 29, 37 (Bkrtcy. M. D. Pa. 1987) (citation omitted). The weight of authority further supports the conclusion that re-opening of the bankruptcy proceedings does not reinstate an automatic stay. *See, e.g., In re Menk,* 241 B.R. 896, 914 (9th Cir. BAP 1999) ("[T]o the extent that the automatic stay expired in conjunction with closing, it does not automatically spring back into effect. If protection is warranted after a case is reopened, then an injunction would need to be

imposed."); *In re Diviney*, 225 B.R. 762, 770 (10th Cir. BAP 1998); *In re Burke*, 198 B.R. 412, 416 (S.D. Ga. Bankr. 1996); *In re Gruetzmacher,* 145 B.R. 270 (Bankr. W.D. Wis. 1991). Plaintiff has submitted, and the court was unable to identify, authority to the contrary.

B. Whether the Motion for Summary Judgment Is Ripe

Plaintiff initially argues that defendant's motion is not "ripe" for consideration. Peace argues that his bankruptcy proceedings have been re-opened, placing these claims back into the process of administration. It has yet to be determined, plaintiff submits, whether the estate administrator will choose to pursue these claims or abandon them to the debtor.

The court finds that plaintiff's ripeness argument is misplaced. First of all, the principle of ripeness was designed to prevent courts from becoming entangled in hypothetical, rather than actual, disputes; Bayer's motion is based on the facts as they actually exist. It is plaintiff who is asking the court to entertain a hypothetical.

To the extent plaintiff is arguing that Bayer's motion is premature, he is similarly misguided. Standing is an element that must exist during the entire length of a lawsuit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Plaintiff has submitted no authority for the novel notion that a court is obliged (or even authorized) to give a party a chance to re-establish standing where it has been lost. The motion is ripe for consideration.

C. Whether Plaintiff Has Standing to Pursue His Claims

and, if not, Whether He Should Be Given a Chance to Substitute

As an initial matter, the court notes that in their briefing the parties did not make a clear distinction between constitutional standing and prudential standing.[1] The principle of constitutional standing requires a plaintiff to "have suffered an injury in fact that is fairly traceable to [defendant] and that a favorable court decision could likely redress." *Dunmore v. United States*, 358 F.3d 1107, 1111-12 (9th Cir. 2004), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiff Peace does possess constitutional standing to pursue these claims; his injuries as alleged are traceable to defendant, and would be redressed by a court decision in his favor. *See id.* at 1112.

Whether plaintiff possesses prudential standing in this case as the "real party in interest," however, is another matter. *Id.; See also Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1292 (11th Cir. 2003)("It is undisputed that Barger's employment discrimination claims satisfy all of these [constitutional standing] requirements. The issue is really about who can litigate the claim, Barger or the [bankruptcy] Trustee."). Defendant here contends that plaintiff lost standing (which the court will interpret to mean *prudential* standing) to pursue his claims when

[1]The confusion is apparently not uncommon. See *Tate v. Snap-On Tools Corp.*, 1997 WL 106275, *4 (N.D. Ill.)("The distinction between standing to sue and the real party in interest doctrine is, understandably, often blurred by judges and lawyers.").

he filed for bankruptcy. At that time, defendant submits, the claims became the property of the bankruptcy estate. Plaintiff does not – and cannot – dispute this conclusion. *See* 11 U.S.C. §541(a)(1).

Plaintiff argues, however, that he should be given a "reasonable time" to substitute the trustee, as the real party in interest, to pursue his claims. Federal Rule 17(a) provides

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Defendant responds that plaintiff cannot avail himself of Fed. R. Civ. P. 17(a) in this case. According to defendant, plaintiff "fundamentally misunderstands the difference between a procedural rule and a constitutional requirement." Def. Rep. at 5. Defendant argues that Federal Rule 17(a) cannot convey subject matter jurisdiction where it is lacking. *Id.*

This may certainly be true. It is defendant, however, that incorrectly interprets the function of Rule 17(a) and its relationship to constitutional, as opposed to prudential, standing. Where the former is lacking, defendant is correct; the rule is inapplicable. Where constitutional standing exists, however, courts have consistently recognized that Federal Rule 17(a), under certain circumstances, authorizes plaintiff lacking prudential standing to substitute the real party in interest. *See,*

e.g., Dunmore v. United States, 358 F.3d 1107, 1112; *Tate v. Snap-On Tools Corp.*, 1997 WL 106275 (1997 N.D. Ill. 1997). As discussed above, Peace does possess the "irreducible constitutional minimum of standing." *Dunmore* at 1112. As also discussed above, he does not have prudential standing; that he lost when he filed for bankruptcy.

The question becomes, then, whether plaintiff meets the standard set forth in Fed. R. Civ. P. 17(a). The plain language of the rule is broad, but courts have imputed some limitation on its application. In particular, a plaintiff must show that his "decision to sue in his own name was an 'understandable mistake.'" *Dunmore* at 1112. Here, of course, plaintiff's mistake was not that he sued in his own name – at the time the complaint was filed, he *was* the real party in interest – but that he failed to properly schedule his claims on his bankruptcy petition, and failed to read the petition before signing and swearing to its accuracy under penalty of perjury. In his motion to reopen filed in the bankruptcy court, plaintiff claimed that due to his stroke, he suffers from a "cognitive impairment" rendering him unable to "remember basic components of this suit." Hanson Decl., Exh. 22. This argument does not explain how Mr. Peace's presumably healthy wife also failed to fulfill her legal responsibility of verifying the accuracy of the statement she was signing, or how Mr. Peace is of mind and body sound enough to pursue a lawsuit and file for bankruptcy but otherwise not healthy enough to be held accountable for his actions. The court finds that

given the inadequacy, if not implausibility, of the attempted excuse, not to mention the complete absence of evidence submitted thereon, failure to read a document before swearing to its veracity "on penalty of perjury" is simply not an "understandable" mistake.

Moreover, according to the rule, a plaintiff may escape dismissal only if he seeks ratification or substitution within a "reasonable time" after a party's objection. Here, over six months have passed since defendant's counsel first brought the impropriety of plaintiff's maintenance of the suit to plaintiff's attention. In addition, nearly a year has passed since plaintiff filed his bankruptcy petition, and over three months have passed since the bankruptcy court reopened proceedings in the matter, with no indication whether the trustee intends to pursue or abandon Peace's claims, or even when such decision can be expected. Neither the trustee nor plaintiff has sought substitution.

The court concludes that plaintiff cannot avail himself of the protections of Fed. R. Civ. P. 17(a), both because his mistake in pursuing this case in his own name was not "understandable," and because he has been afforded far more than "reasonable" time to seek substitution of the real party in interest, but has failed to do so. Defendant's motion for summary judgment is therefore granted.

D. Whether the Trustee Should Be Given an Opportunity to Be Heard

The court has concluded that this matter is not stayed, that the issue of summary judgment is ripe, and that plaintiff lacks standing to pursue his claims. The court is also concerned, however, that dismissal of this case without a limited amount of time for the bankruptcy trustee to be heard would potentially deprive plaintiff's creditors of a putative asset, through no fault of their own. Given the bankruptcy court's decision to reopen plaintiff's proceedings, this concern is more than hypothetical or speculative. Therefore, the court hereby extends the time allowed under Fed. R. Civ. P. 59(e) for the trustee (and only the trustee) to make an appearance and move, if he or she determines it appropriate, to alter or amend the judgment rendered in this case. The trustee shall have 60 days from the date of entry of this order to do so. Failure to do so within that time shall be construed as a waiver.

E. Plaintiff's Counsel's Motion to Withdraw

Plaintiff's counsel has also filed a motion to withdraw. The court finds that counsel's sealed motion fails to demonstrate good cause therefor. Moreover, the instant order dismisses this matter, and unless the bankruptcy trustee moves for an alteration of judgment, the case is now concluded. Any burden placed on plaintiff's counsel by the court's denial of their motion to withdraw is potentially very minimal. Therefore, the motion to withdraw is hereby DENIED.

III. CONCLUSION

For the foregoing reasons defendant's motion for summary

judgment is GRANTED. This case is DISMISSED without prejudice. Plaintiff's counsel's motion to withdraw is DENIED.

The court directs the clerk to send a copy of this order to plaintiff Peace's bankruptcy counsel as indicated in the "Plea in Abatement" filed in this case on March 27, 2006. The trustee in Peace's bankruptcy proceedings shall have 60 days from the date of entry of this order to move for an amendment or alteration of judgment.

DATED at Seattle, Washington this 28th day of July, 2006.

Barbara J. Rothstein

UNITED STATES DISTRICT JUDGE